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No. 00-181

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES W. WOOD,

Petitioner,

—v.—

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a state-court complaint alleges that the "real reason" for terminating the plaintiff's employment was to prevent his vesting lifetime medical benefits under a pension plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), does the doctrine of complete preemption permit removal of the complaint as an exception to the well-pleaded complaint rule, regardless of the nature of the damages sought by the complaint?

STATEMENT PURSUANT TO RULE 29.6

The Prudential Insurance Company of America has no parent companies, nor does any publicly held company own an interest of more than ten percent in The Prudential Insurance Company of America.

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STATUTORY PROVISIONS INVOLVED

This matter involves various provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, including the following:

29 U.S.C. § 1132(a) [ERISA § 502(a)] provides in pertinent part:

> (a) Persons empowered to bring a civil action. A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5) or (6) of subsection (c) of this section or under subsection (i) or (1) of this section.

29 U.S.C. § 1140 [ERISA § 510] provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an

employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 *et seq.*], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1144(a) [ERISA § 514(a)] provides:

(a) Supersedure; effective date.
Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Prudential Insurance Company of America, respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. Respondent submits that the Petition should be denied because the question presented does not reflect conflicting decisions of courts of appeals and was, in fact, decided by the United States Court of Appeals for the Third Circuit based on settled law. Petitioner raises no other issue that is ripe for review.

STATEMENT OF THE CASE

The facts are fully set forth in the Third Circuit opinion affirming the district court's judgment. (Pet. 2a-9a.) Set forth below is a summary of the facts which relate to the issues raised in the Petition for a Writ of Certiorari.

On March 19, 1998, after his termination from employment with Respondent, Petitioner filed a complaint against Respondent in the Superior Court of New Jersey, Law Division, Hunterdon County, asserting claims of age discrimination under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (the "NJLAD") and the New Jersey State Constitution, in addition to state-law tort claims of defamation and intentional infliction of emotional distress (the "Complaint"). (Appendix to Respondent's Brief

in Opposition (referred to hereinafter as "Resp't App.") 1A-10A.) On May 11, 1998, Respondent removed this action to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1331 and § 1441(b), on the ground that it was completely preempted by § 502 and § 510 of ERISA,[1] and thus not subject to the "well-pleaded complaint" doctrine. Respondent further requested that the court assert supplemental jurisdiction over the remaining state claims pursuant to 28 U.S.C. § 1367.

Respondent maintains an employee benefit plan subject to the provisions of ERISA that provides pension benefits and continued health insurance to retired employees and their dependents. Respondent based its removal on the language of the Complaint which asserted a pension-defeating motive for terminating Petitioner's employment as follows:

> the real reason that [Respondent] terminated the employment of [Petitioner] was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with [Respondent], [Petitioner] was about to

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[1] In keeping with the form of citations contained in the Petition, Respondent will refer to sections of ERISA by their internal statutory citations. Parallel references to the United States Code are provided in Respondent's Table of Authorities.

> become eligible for full retirement benefits. [Respondent] knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of [Petitioner] and of his dependents, including [Petitioner's] son . . . .

(Resp't App. 3A.)

This case does not raise broad factual, policy or legal questions because avoidance of the obligation to pay medical benefits is the *only* reason asserted in the Complaint for Respondent's termination of Petitioner's employment. As the district court found, and the court of appeals concurred:

> [a]side from nearing early retirement age, there are no facts alleged in the Complaint to support a claim that [Petitioner's] age had any bearing on [Respondent's] decision to terminate him.

(Pet. 30a.)

On May 27, 1998, Petitioner and his wife filed a *second* complaint against Respondent in the same district court asserting, *inter alia*, claims under ERISA § 502(a)(1)(b) and § 510, which contains the exact same allegations as his purported state court Complaint. (*Compare* Resp't App. 14A-15A, ¶¶ 6-7, *and* Resp't App. 3A-4A, ¶¶ 4-5.) Petitioner subsequently moved to remand the removed Complaint.

On July 2, 1998, Respondent moved to consolidate the two actions because the factual allegations of each were virtually identical, and, in particular, the allegations relating to § 510 were identical. Petitioner's sole opposition to the motion to consolidate was that, before reaching the issue of consolidation, the district court should address Petitioner's remand motion.

By Opinion and Order dated July 30, 1998, Chief District Court Judge Thompson denied Petitioner's Motion to Remand, finding that his discrimination claims under the NJLAD and the New Jersey State Constitution were completely preempted by § 510 of ERISA, and additionally ordered the actions consolidated. (Pet. 25a-35a.)[2]

On March 28, 2000, the United States Court of Appeals for the Third Circuit in a published opinion affirmed the judgment of the district court. *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674 (3d Cir. 2000). (Pet. 1a-24a.) Petitioner's subsequent Petition for Rehearing and Rehearing

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[2] The district court also exercised supplemental jurisdiction over the claims of defamation and intentional infliction of emotional distress, (Pet. 25a-35a) (citation omitted), noting that, "[t]he inapplicability of the doctrine of complete preemption to [these counts] has no bearing on the availability of ordinary preemption to [Respondent] as a defense to both claims." (Pet. 35a.)

En Banc was denied by an *en banc* panel of the court of appeals. (Pet. 36a.)

SUMMARY OF ARGUMENT

Petitioner has asserted three bases for his contention that this Court should review the lower court's decision:

First, Petitioner contends his ERISA § 510 claim is not completely preempted because, only ERISA § 502(a)(1)(B) claims are completely preempted as matter of law. Petitioner further argues that the lower courts are in wide disagreement over this issue.

Second, Petitioner contends that his § 510 claim cannot be preempted under *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987), because, unlike the plaintiff in that case, Petitioner did not explicitly seek, as damages, the reimplementation of his pension benefits.

Third, Petitioner contends that language in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), somehow immunizes his Complaint from complete preemption – and thus, from removal to federal court – even though he pleads only a pension-defeating motive and no facts establishing an independent state age discrimination cause of action, and he does not attempt to plead a claim for age discrimination under federal law.

As set forth below, none of these arguments raises an issue deserving of review by this Court, due to the unique factual circumstances of this case and the settled law on these issues. Notwithstanding Petitioner's assertions, no split in the circuits has arisen on the applicable law, and, to the extent that the circuit courts' opinions may continue to develop in this area, there is no issue ripe for review.

ARGUMENT

A.

THE PETITION SHOULD BE DENIED BECAUSE IT IS SETTLED BY LAW THAT COMPLETE PREEMPTION APPLIES TO § 510 CLAIMS, WHICH ARE ENFORCED UNDER § 502(a).

1. The Circuit Courts Have Uniformly and Properly Read *Metropolitan Life* to Apply Complete Preemption to All § 502(a) Claims.

Contrary to Petitioner's characterization of the lower court's decision, the court of appeals adhered to the comprehensive guidance offered by this Court concerning complete preemption under § 502(a) of ERISA. There is no split in the circuits on this issue. Simply put, every court of appeals to have considered the question has agreed with the determination below that *all* claims arising under ERISA

§ 502(a), including § 510 claims, are completely preempted under this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). *See Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F. 3d 1212, *as amended*, 208 F.3d 1170 (9th Cir. 2000) (finding cause of action falling within § 502(a) completely preempted); *Smith v. Provident Bank*, 170 F.3d 609, 613-14 (6th Cir. 1999) (finding claim under § 502(a)(2) completely preempted); *Romney v. Lin*, 94 F.3d 74, 80-81 (2d Cir. 1996) (finding claim under § 502(a)(3) is completely preempted), *cert. denied*, 522 U.S. 906 (1997); *Anderson v. Electronic Data Servs. Corp.*, 11 F.3d 1311, 1314-15 (5th Cir.) (finding claims under §§ 502(a)(2) and (3), including § 510 claim, completely preempt state cause of action), *cert. denied*, 513 U.S. 808 (1994); *see also Kalo v. Moen Inc.*, 93 F. Supp.2d 869, 872 (N.D. Ohio 2000) ("[n]umerous circuit courts have applied the complete preemption doctrine of *Metropolitan Life* to claims arising under provisions of [§ 502(a)] other than subsection [502(a))(1)(B)")]); *C.C. Mid West, Inc. v. McDougall*, 990 F. Supp. 914, 920 (E.D. Mich. 1998) ("federal courts possess [removal] jurisdiction over all claims originating under [§ 502(a)], and not just [§ 502(a)(1)(B)]"). Petitioner relies solely on Chief Judge Stapleton's dissent, and cites *no* court of appeals decision that holds that ERISA's complete preemption power is limited to subsection (a)(1)(B).[3]

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[3] The uniformity among decisions of lower courts is well justified, as a reading of *Metropolitan Life* (continued...)

Reasoning backward from his desired result, Petitioner insists instead that *Metropolitan Life* sets forth a "requirement that the ERISA 'complete preemption' doctrine be applicable *only* with respect to suits 'to enforce benefit rights under the plan or to recover benefits under the plan.'" (Pet. 10.) This cramped interpretation of *Metropolitan Life*'s reasoning ignores almost all of the decision's language and logic, as well as the import of decisions of this Court handed down on ERISA complete preemption prior and subsequent to *Metropolitan Life*.

Metropolitan Life contains multiple references to § 502(a) generally when dealing with ERISA removal. While analogizing § 502(f) to § 301 of the Labor Management

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[3](...continued)
unequivocally indicates that this Court considered, and applied its holding to, claims falling within the entire scope of ERISA § 502(a). *See generally* Langbein & Wolk, *Pension and Employee Benefits Law,* 689 (Foundation Press, 2d ed. 1989) (*Metropolitan Life* "certainly implies that any claim within the scope of ERISA § 502(a) would fall within the *Avco* [complete preemption] rule").

Relations Act of 1947, 29 U.S.C. §§ 141-88 (the "LMRA"),[4] this Court stated in that decision as follows:

> The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> > [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under*

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[4] LMRA § 301 provides that suits "may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Section 502(f) of ERISA reads: The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action. 29 U.S.C. § 1132(f).

> *section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan Life, 481 U.S. at 65-66 (emphasis in original). This Court continued by stating:

> Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.

Id. at 66.

As these statements demonstrate, this Court considered the removability of ERISA actions in the context of § 502(a) generally, without limiting removability to claims brought only under subsection (a)(1)(B). Since *Metropolitan Life*, this Court has consistently indicated that it considers § 502(a), and not merely subsection (a)(1)(B) thereof, to be the equivalent of the LMRA's exclusive remedy. Most recently, in *UNUM Life Insurance Co. of America v. Ward*, Justice Ginsburg discussed *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), noting this Court's agreement, in that case, with the proposition that § 502(a) was modeled on the exclusive remedy provided by LMRA § 301. *Unum Life Ins. Co.*, 526 U.S. 358, 376 n.7 (1999).

Moreover, ERISA's legislative history demonstrates that preemption removal is necessary for important policy

reasons, such as uniformity and the delicate 'interest balancing' achieved under the statute.[5] Without a predictable and uniformly applied set of remedies for causes of action regarding employee benefit plans, employers, stung by large plaintiff's awards, could easily abandon their voluntary provision of such benefits. This Court has noted the importance of this balancing:

> [t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life, 481 U.S. at 54 (1987). Given that § 510 makes "pension-defeating" claims enforceable under § 502(a), this Congressional rationale, recognized by this Court on the same

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[5] H.R. Rep. No. 93-533, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1639-40 (noted in *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 n.8 (N.D. Ga. 1983)); *Subcommittee on Labor, Senate Comm. of Labor and Pub. Welfare*, 94th Cong., 2d Sess., *Hearings on the Employee Retirement Income Security Act of 1974*, at 4800 (Comm. Print 1976) (remarks of Senator Nelson), noted in *Whitaker*, 566 F. Supp. at 751 n.8.

day it decided *Metropolitan Life,* applies with equal force to § 510 claims, which typically replace tort-type actions and their various punitive and compensatory damages schemes.

The *Metropolitan Life* decision is not, of course, this Court's first pronouncement on ERISA complete preemption. In *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25-27 (1983), which Petitioner neglects to mention, this Court recognized that the "*Avco* rule" could be properly applied to support removal in the ERISA context, even when the remedy requested by the plaintiff was available only under state law. *Id.* at 22-23 (citing *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557, 560 (1968)); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968) (rejecting petitioner's argument that its reliance on state law was determinative of the removal issue). Thus, Petitioner is plainly wrong when he argues that his claim is not subject to the complete preemption rule because he sought only a state-court remedy not provided in § 502(a).

2. *Ingersoll-Rand* Also Recognized that Complete Preemption Applies to ERISA § 510 Claims.

Petitioner also contends that the *Ingersoll-Rand Co. v. McClendon* decision, 498 U.S. 133 (1990), which examined ERISA's complete preemption of, in Petitioner's words, an "analogous state law discrimination claim[]," provides no guidance on complete preemption in this matter. (Pet. 4.) Petitioner is absolutely mistaken.

In *Ingersoll-Rand*, this Court recognized that "pension-defeating motives," such as those alleged by Petitioner, are cognizable under § 510 of ERISA, which specifically prohibits employers from taking adverse action against their employees in order to interfere with their ERISA-protected rights. 498 U.S. at 142-43. Directly addressing the "well-pleaded complaint rule," this Court concluded:

> "Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state-law claims, "even when the state action purported to authorize a remedy unavailable under the federal provisions." *Pilot Life, supra*, at 55, 107 S. Ct., at 1557. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987), we again drew upon the parallel between § 502(a) and § 301 of the LMRA to

> support our conclusion that *the pre-emptive effect of § 502(a) was so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitation imposed by the "well-pleaded complaint" rule.* Id., at 64-67, 107 S. Ct. at 1546-48.

Id. at 144-45 (emphasis added). Thus, *Ingersoll-Rand* strongly supports the proposition that complete preemption applies to all of § 502(a), including § 510 claims enforced pursuant to § 502(a)(3).[6]

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[6] Petitioner's dismisses *Ingersoll-Rand*'s statements as mere dicta. To classify *Ingersoll-Rand*'s elucidation of the *Metropolitan Life* decision in the case as dicta is, in fact, inappropriate and incorrect. The judicial assertions in *Ingersoll-Rand* are not "mere obiter dicta," but rather present "the well-established rationale upon which the Court based the results of its earlier decisions," namely, the rationale set forth in *Metropolitan Life* case. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Id.* (citations omitted); *see also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As

(continued...)

3. The *Hazen Paper* Decision Is Inapposite in that It Does Not Address Complete Preemption.

Petitioner invokes this Court's language in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in support of his claim that the lower court has "effectively rejected the entire prospect of dual liability for age discrimination (or discrimination predicated by membership in any other protected group), *and* under ERISA § 510, arising from the same 'pension-defeating' motive." (Pet. 14-15.)

Petitioner's misstatement in this regard is transparent: although the *Hazen Paper* opinion (which clarified the standard for disparate treatment under the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA")) considered the appropriate standard for militating between two competing *federal* statutes (ERISA and the ADEA), it explicitly did *not* address the preemptive effect of ERISA over a state-law claim, and is therefore inapposite to the issue at hand.

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[6](...continued)
a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting).

Fatal to Petitioner's argument based on *Hazen Paper*, moreover, is the single fact that Petitioner never even attempted to bring a *federal* age discrimination claim, and has through his pleadings, cast his case squarely outside the parameters of the discussion in *Hazen Paper*. Consistent with the law of complete preemption, Petitioner cannot argue to allocate his state law claim between federal and state remedies. In any event, there is no conflict among the circuits over whether *Hazen Paper* applies to a state court claim, let alone a claim, such as that presented here, that is devoid of an independent age claim.

B.

THE CASES CITED BY PETITIONER TO DEMONSTRATE A CONFLICT AMONG THE CIRCUITS ARE INAPPOSITE OR IMPLICITLY OVERRULED.

Petitioner misrepresents the law regarding ERISA's complete preemption as conflicted and uncertain. As noted recently in a lower court decision, some question initially arose following *Metropolitan Life* because that case presented a claim covered by § 502(a)(1)(B). *Kalo v. Moen, Inc.*, 93 F. Supp.2d 869, 872 (N.D. Ohio 2000). Commentators therefore questioned "whether the other provisions of [§ 502(a)] have the same completely preemptive effect as subsection [502(a)(1)(B)]." *Id.* In fact, no true conflict developed on this issue, as the lower courts considering

§ 502(a)(1)(B) cases have properly limited their discussion on complete preemption to the issue before them, having no need to apply complete preemption under § 502(a) more broadly. *Id.* (finding that the tendency of many courts to restrict their language to § 502(a)(1)(B) "'is no doubt attributable to the fact that most [ERISA] cases arise under that section,'" as they "involve situations in which an individual seeks to recover plan benefits, enforce his or her rights under a plan, and/or clarify his or her rights to future benefits under a plan") (quoting and citing *C.C. Mid West, Inc. v. McDougall,* 990 F. Supp. 914, 919 (E.D. Mich. 1998)). Speculation of commentators aside, the lower court decisions limited to determining removal of § 502(a)(1)(B) claims hardly create a conflict regarding an issue these decisions *did not* address. In any event, no such conflict arises from the cases cited by Petitioner.

Petitioner relies extensively on the Sixth Circuit decision, *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995), for evidence of a circuit split on the issue of complete preemption. Not only is *Warner* fundamentally distinguishable, both factually and legally, but, to the extent that dicta in *Warner* suggested that complete preemption might be limited to § 502(a)(1)(B), it has been implicitly overruled by the more recent decision of the Sixth Circuit in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999).

In *Warner*, the plaintiff brought an action for age discrimination in violation of Michigan state law. *Warner*, 46

F.3d at 533. Specifically, the plaintiff claimed "that the defendant-employer threatened to discharge the plaintiff because of his age unless he took early retirement." *Id.* at 534. Thus, the court of appeals properly found that the plaintiff had stated "a straight state age discrimination case which has no counterpart or superseding cause of action in ERISA." *Id.* Accordingly, ERISA was not implicated and preemption removal was not at issue. The *Warner* court discussed *Metropolitan Life* in dicta solely in order to resolve a conflict *within* the Sixth Circuit as to the distinction between ordinary preemption under ERISA § 514, which does not convert a state claim into an action arising under federal law, and complete preemption involving the § 502 enforcement scheme, which creates a federal claim for removal purposes. *Id.* at 535 ("[r]emoval and preemption are two distinct concepts").

More recently, the Court of Appeals for the Sixth Circuit in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), considered a claim arguably covered by ERISA's prohibition against breach of fiduciary duty (§ 502(a)(2)). The *Smith* court noted:

> Neither the Supreme Court nor this court has expressly extended this complete preemption doctrine to claims for breach of fiduciary duty, which fall under [§ 502(a)(2)], not [§ 502(a)(1)(B)]. However, we see little reason to distinguish between the two

> provisions. ERISA is at least as concerned with defining and standardizing the duties of a fiduciary as it is with providing for recovery of benefits.

Id. (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-53 (1993)). Accordingly, Petitioner's posit of a conflict on this issue, raising false alarm that such conflict will proliferate, is not borne out by the developing law of the Sixth Circuit itself, which does not present a conflict or any issue ripe for review by this Court.

Finally, Petitioner places great emphasis on the *Rokohl v. Texaco, Inc.* decision by the Court of Appeals for the Fifth Circuit, as evidence of a circuit split. 77 F.3d 126 (5th Cir. 1996). Like *Warner*, the *Rokohl* decision is fundamentally distinguishable from the instant case. First, Petitioner concedes that *Rokohl* does not address complete preemption, but rather only "ordinary" preemption under ERISA § 514,[7] discussed *supra*. (Pet. 5.) Petitioner's insistence that this Court somehow find dissension among the circuit courts based

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[7] Indeed, the *Rokohl* decision did not even make passing mention of complete preemption and made note of the fact that the *Rokohl* action was "removed to federal district court on *diversity grounds*." 77 F.3d at 128 (emphasis added) (footnote omitted).

on a case completely devoid of discussion on the singular issue on petition is simply puzzling.

Even assuming, *arguendo*, that *Rokohl* had considered the issue of complete preemption, that decision, like *Warner*, is distinguishable from the instant case on the critical fact that the complaint in *Rokohl* stated an independently viable wrongful termination claim, in addition to an ERISA claim. *Rokohl*'s wrongful termination claim "would pertain even if [the employer] had not maintained an ERISA plan at all." *Rokohl,* 77 F.3d at 130. In contrast, Petitioner's Complaint asserts a pension-defeating motive and no other.

Moreover, both prior and subsequent to the *Rokohl* decision, the Court of Appeals for the Fifth Circuit has explicitly addressed the question of whether claims such as Petitioner's § 510 claim are completely preempted. *See Kramer v. Smith Barney*, 80 F.3d 1080, 1083-84 (5th Cir. 1996); *Anderson v. Electronic Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir.), *cert. denied*, 513 U.S. 808 (1994). Not surprisingly, the Fifth Circuit has joined every other circuit to have considered the issue by concluding, based on *Metropolitan Life* and *Ingersoll-Rand*, that claims arising under § 502(a) are subject to complete preemption. *Kramer*, 80 F.3d at 1084; *Anderson*, 11 F.3d at 1315.

After *Rokohl*, *supra*, Petitioner offers only scattered district courts' opinions in support of his claim of lower court "uncertainty" following *Metropolitan Life*. Like *Rokohl* and

Warner, these cases are inapposite because Petitioner has not pleaded an independent age discrimination claim. *See, e.g., Kalo v. Moen Inc.*, 93 F. Supp.2d 869, 874 (N.D. Ohio 2000) (finding state law age claim not completely preempted where claim "does not hinge on the theory that [defendant] was attempting to prevent [plaintiff] from obtaining plan benefits," but rather "set forth specific allegations of disparate treatment based exclusively on discriminatory animus"); *Miller v. Exxon Corp.*, No. Civ. A. 98-2441, 1998 WL 781592, at *2 (E.D. La. Nov. 10, 1998) (unreported) (granting motion to remand state law age claim where plaintiff stated a "'straightforward age discrimination claim'" . . . "regardless of whether [her employer] maintained an ERISA-qualified retirement plan") (quoting *Donald v. Virginia Elec. & Power Co.*, 7 F. Supp.2d 694, 698 (E.D.N.C. 1998)); *Donald*, 7 F. Supp.2d at 698 (granting motion to remand a straight state age discrimination case which did not "depend upon, or even relate to, the existence of an ERISA benefits plan"); *Smith v. Cohen Benefit Group, Inc.*, 851 F. Supp. 210, 213 (M.D.N.C. 1993) (granting motion to remand state law claims "which would exist if the Plan never came into existence").

In contrast, but not in conflict, with the foregoing cases, the Court of Appeals for the Third Circuit noted the unique fact pattern presented to it, and limited its holding accordingly, stating "[w]e agree with the District Court when it noted: 'Aside from nearing early retirement age, there are no facts alleged in the Complaint to support a claim that Wood's age had any bearing on Prudential's decision to

terminate him.'" *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 677 (3d Cir. 2000) (Pet. 4a-5a).

C.

PETITIONER'S CLAIM IS NOT IMMUNIZED FROM COMPLETE PREEMPTION BY HIS CHOICE OF REMEDIES.

Although Petitioner admits that he "openly plead[ed] Prudential's 'pension-defeating motive,'" (Pet. 9), which pleading falls squarely within the ambit of § 510, he asserts that his claim is not completely preempted by § 502(a), because he is not seeking any of the relief provided by that section, (Pet. 8-14). This argument flouts the basic principles established by this Court under the complete preemption doctrine. As this Court has noted, the careful crafting of ERISA's enforcement scheme is "'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

Although a *replacement* federal cause of action must be present for complete preemption to exist, it is not necessary that cause of action provide *the exact remedy* sought by the plaintiff in his state-law action. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S.

557, 560-61 (1968). "The fact that ERISA does not provide the *remedy* [Petitioner] 'seek[s] is not relevant; all that matters is that the *claim* be within the scope of § 502(a)." *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 5 n.4 (1st Cir. 1999) (citing *Pilot Life Ins.*, 481 U.S. at 54-55) (finding a claim for improper processing of benefits fell within § 502(a), even though the remedy sought was not authorized by ERISA).

As *Metropolitan Life* teaches, the test for complete preemption is not whether ERISA provides a cause of action identical to the state law action being preempted, but whether that state law action is "within the scope of the civil enforcement provisions of § 502(a)." *Metropolitan Life*, 481 U.S. at 66-67. In *Metropolitan Life*, this Court found that Taylor's state law claims, including a claim for wrongful termination, were all properly removed even though ERISA does not provide a cause of action identical to any of his state law claims. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144-45 (1990); *Metropolitan Life*, 481 U.S. at 66-67; *Pilot Life*, 481 U.S. at 56.

In *Ingersoll-Rand*, this Court again rejected the same argument – that the petitioner was not seeking any of the specific relief provided by § 502(a) – stating:

> there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits' . . . . Consequently, it

> is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ingersoll-Rand Co., 498 U.S. at 145.[8]

There is no controversy among the circuit courts over the delineation of this principle, and Petitioner cites none.

CONCLUSION

Absent any facts alleged in the Complaint to support a claim that Petitioner's age was the basis of the decision to terminate him, Petitioner's claim under state age discrimination law pleads a uniquely pension-defeating motive, which is exclusively and unambiguously within the ambit of § 510 of ERISA. The application of complete preemption by the court below to Petitioner's pension-defeating claim, based on the settled principles of

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[8] This Court has explicitly rejected the argument that ERISA should not preempt state law to the extent that employees have less protection than they did before ERISA was enacted. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993) (ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs") (citing *Pilot Life*, 481 U.S. at 54-56).

Metropolitan Life and *Ingersoll-Rand,* creates no conflict among the circuit courts of appeals and raises no issue of law ripe for review by this Court. Accordingly, the Petition seeks no more than a further appellate review of the decision of the court below based on facts unique to this case. On this basis, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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